Supreme Court, U.S.
FILED
SEP 24 2003
OFFICE OF THE CLERK

No. 03-245

In the Supreme Court of the United States

DALE R. DEROLPH, ET AL.,
Petitioners,

v.

THE STATE EX REL.
STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

PETITIONERS' REPLY BRIEF

NICHOLAS ANDREW PITTNER
Counsel of Record
BRICKER & ECKLER LLP
100 SOUTH THIRD STREET
COLUMBUS, OH 43215-4291
(614) 227-2300
(614) 227-2390 (FAX)

Counsel for Petitioners

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

I. The State's Brief In Opposition Provides Compelling Evidence Of The Need For, And Appropriateness Of, Review By This Court 1

A. The State denies any obligation to obey the directives of the highest court of Ohio concerning rights established by the supreme law of Ohio . . 1

B. The state's disingenuous theory that "closure" of a case nullifies the final judgment eviscerates the rule of law 3

II. Petitioners' Claims Are Properly Before The Court And The Petition Should Be Granted 5

A. Petitioners' claims were pressed below 5

B. *Lewis* – not *DeRolph IV* – is at issue 6

C. Petitioners' interests are momentous and merit due process protection 7

D. Protection of Petitioners' rights need not entangle the Court in local matters 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

Cases

Brown v. Board of Educ., 347 U.S. 483 (1954) 2, 7

DeRolph v. State,
78 Ohio St.3d 193, 677 N.E.2d 733 (1997) 3

DeRolph v. State,
78 Ohio St.3d 419, 678 N.E.2d 886 (1997) 3

DeRolph v. State,
89 Ohio St.3d 1, 728 N.E. 2d 993 (2000) 7, 10

DeRolph v. State,
93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) 5

DeRolph v. State,
97 Ohio St.3d 434, 780 N.E. 2d 529 (2002) . . . passim

Dewey v. Des Moines, 173 U.S. 193 (1899) 6

Glassroth v. Moore, 335 F.3d 1282 (11th Cir. 2003) . . . 2

Goss v. Lopez, 419 U.S. 565 (1975) 7

Grutter v Bollinger, 123 S.Ct. 2325 (2003) 7

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1982) 8, 9

McKnett v. St. Louis & S. F. R. Co.,
292 U.S. 230 (1934) 8

Missouri v. Jenkins, 515 U.S. 70 (1995) 2

San Antonio Indep. Sch. Dist. v. Rodriguez,
411 U.S. 1 (1973) 9

Stanley v. Illinois, 405 U.S. 645 (1972) 6

State ex rel. State of Ohio v. Lewis,
99 Ohio St.3d 97, 789 N.E.2d 195 (2003) . . . . passim

I. The State's Brief In Opposition Provides Compelling Evidence Of The Need For, And Appropriateness Of, Review By This Court.

If the petition for certiorari left any doubt as to the need for and appropriateness of the review sought by Petitioners, the State's Brief in Opposition must certainly remove it. In its brief, the State brazenly claims for itself the unilateral right to determine when and with respect to whom a final judgment issued by the highest court of Ohio is binding, thereby signaling contempt not only for these Petitioners but for the rule of law *in toto*. Absent the intervention of this Court, the State clearly intends to continue depriving Ohio's school children of their declared rights, in contravention of the Due Process Clause of the United States Constitution.

A. The State denies any obligation to obey the directives of the highest court of Ohio concerning rights established by the supreme law of Ohio.

One may scour the State's brief in vain for any indication that the State intends to comply with *DeRolph v. State*, 97 Ohio St.3d 434, 780 N.E. 2d 529 (2002) ("*DeRolph IV*") or perceives any obligation to do so now that the case is, in the State's view, "closed."[1] In essence, the State claims to stand above the law. Such a view, espoused by Ohio's Attorney

[1] While the State claims to have improved its funding system *prior to DeRolph IV*, in response to earlier *DeRolph* decisions, it makes no pretense of having complied with *DeRolph IV*, which determined that the school funding system remained unconstitutional and that "the General Assembly has not focused on the core constitutional directive of *DeRolph I*: 'a complete systematic overhaul' of the school-funding system." *DeRolph IV* at 435. Moreover, the State has now retreated from reforms it earlier implemented, making the predicament of many of Ohio's schools more desperate today than at the time *DeRolph IV* was rendered. *See* Brief of Amici Curiae Various Members of the Ohio General Assembly Minority Caucuses in Support of Petitioners.

General on behalf of the State of Ohio, must be regarded as dangerous, and it must be forcefully rejected by the Court.

There is no longer room for debate regarding the unconstitutionality of Ohio's school funding system, nor does the State claim any. Likewise, there can be no debate regarding the obligation of the State to comply with orders of the Ohio Supreme Court concerning the educational mandates of the Ohio Constitution.[2] The State's repudiation of this obligation, and the consequent negation of the declared rights of Ohio's children, cannot be squared with the rule of law.

In previous generations, there were officials who, to the lingering shame of their respective states, refused to enforce the desegregation decrees of the federal courts.[3] The present conduct of Ohio's officials is a throwback to those times and must not be indulged. The intervention of this Court is

---

[2] The relief ordered by *DeRolph* has always been both declaratory and injunctive. The State's claim that the Ohio Supreme Court "limited itself to declaratory relief," State's Brief at 4, plainly contradicts the facts *and* the State's own acknowledgment of the court's remedial orders. State's Brief at 3 ("*DeRolph* plaintiffs received...a remedial directive"), 14 ("remedial orders that the Oho Supreme Court has already issued"), and 22 ("the court directed the Ohio General Assembly to fix the system."). *See also* Petition at 3-5.

[3] Others understood that the rule of law must prevail, regardless of personal preferences or political pressures. *See, e.g., Missouri v. Jenkins*, 515 U.S. 70, 94 n.6 (1995) ("Immediately after the Court's decision in *Brown v. Board of Education*, the State's Attorney General issued an opinion declaring the provisions that mandated segregation unenforceable.") (citations omitted). *But see Glassroth v. Moore*, 335 F.3d 1282, 1303 (11th Cir. 2003) ("The rule of law does require that every person obey judicial orders when all available means of appealing them have been exhausted. ...If necessary, the court order will be enforced. The rule of law will prevail."), and *Glassroth v. Moore* ____ F. Supp.2d ____, 2003 U.S. Dist. LEXIS 13907, 6-7 (M.D. Ala. Aug. 5, 2003).

essential to protect the federal due process rights of Ohio's school children and to restore the rule of law to Ohio.

B. The state's disingenuous theory that "closure" of a case nullifies the final judgment eviscerates the rule of law.

The State grounds its refusal to obey the directives of the Ohio Supreme Court on a characterization of the *DeRolph* litigation as "closed." The State's logic is bizarre. The idea that a final judgment has no value unless a court retains jurisdiction is inimical to the rule of law (and unsupported by even a single citation to authority). It is also flatly contradicted by the mandate sent to the trial court in this case, which commanded that court to "proceed without delay to carry the [judgment] in this cause into execution."[4]

Had there been no appeal of the trial court's initial *DeRolph* decision, the trial court indisputably would have had jurisdiction to enforce its orders. Yet the State now argues that because the trial court's decision was appealed and essentially *upheld*, the final judgment is unenforceable.

If permitted to stand, the State's "closure" theory would drastically alter long standing principles of appellate jurisprudence. *Every* appellate court would be required to retain jurisdiction over *every* case, *in perpetuity*, lest its judgments otherwise have no effect. Lawyers throughout Ohio would advise defendants that they need not comply with

[4] *DeRolph IV*'s mandate concerned an *immediately-effective final judgment*, and the mandate was therefore sufficient to enable the trial court to enforce the judgment. No *remand* was required. *Compare DeRolph v. State*, 78 Ohio St.3d 419, 421, 678 N.E.2d 886 (1997) (explaining the remand to the trial court for hearing during the stay of *DeRolph v. State*, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997) ("*DeRolph I*") as follows: "Our decision to remand this matter is a recognition of the unique role of trial courts as triers of fact and gatherers of evidence.").

adverse judgments of Ohio's high court once that court "closes" the case, and lawyers representing prevailing plaintiffs would advise them in these circumstances to appeal *favorable* judgments to *this* Court in order for the judgments to be meaningful.

The State's theory bears no resemblance to any conceptualization of ordered liberty, and it must be doubted whether even the State takes it seriously. If the State sincerely believed, and intended to universally implement, its revolutionary proposition that judgments lose effect once appellate courts relinquish jurisdiction, the extent of upheaval throughout the state and nation can scarcely be imagined.[5] In truth, however, there is no evidence the State has generalized or intends to generalize its "closure" theory beyond the attempted application here. The State's conceit is shameful and supports Petitioners' claim that the State, empowered by *State ex rel. State of Ohio v. Lewis*, 99 Ohio St.3d 97, 789 N.E.2d 195 (2003) ("*Lewis*"), has uniquely deprived them, and them alone, of their federally-protected rights to due process and equal protection of the laws.

Although the concept of "closure" plainly cannot have the meaning the State attributes to it, the finality of *DeRolph IV* is relevant. The court did indeed close the *merits* of the case, and Petitioners were, for the first time, recipients of a final judgment in their favor with remedial decrees that were neither stayed nor subject to reconsideration. *Petitioners* had no reason to desire further review of *DeRolph IV* – and *the*

[5] For example, the State's "closure" theory would mean that *no* declaration of unconstitutionality heretofore issued by the Ohio Supreme Court is presently effective since, as noted in *DeRolph IV*, "[i]n no case other than *DeRolph* have we [the Ohio Supreme Court] retained jurisdiction once we have made a finding of unconstitutionality." *Id.* at 441 (Lundberg Stratton, J., concurring in part and dissenting in part).

State was barred by *res judicata* from relitigating it.[6] Unable to challenge *DeRolph IV* directly, the State sought a means to evade it. *Lewis* accomplished this not by altering *DeRolph IV*, but by prohibiting its enforcement. This *Lewis* may not do consistent with the Due Process Clause.

II. Petitioners' Claims Are Properly Before The Court And The Petition Should Be Granted.

A. Petitioners' claims were pressed below.

In the Answer they filed as Intervenors in *Lewis*, Petitioners asserted that issuance of the writ of prohibition would, by divesting the trial court of remedial authority for the wrongs declared in *DeRolph IV*, violate rights protected by the United States Constitution, specifically referencing substantive due process. The State concludes, without supporting authority, that "[s]urely that slight reference is not enough."

But the Answer was Petitioners' *only* filing in *Lewis*, save their Motion to Intervene. Had the Ohio Supreme Court permitted further briefing, hearing, or argumentation before summarily issuing the writ of prohibition, Petitioners could have more fully presented their federal claims to that court. In the context of an Answer, however, the reference was appropriate and sufficient to preserve Petitioners' claims for review by this Court.

In arguing otherwise, the State disregards the oft-repeated principle that "no particular form of words is necessary to be used in order that the Federal question may be said to be

[6] *DeRolph IV* constituted a final judgment issued in response to the State's earlier motion for reconsideration of *DeRolph v. State*, 93 Ohio St.3d 309, 754 N.E.2d 1184 (2001) ("*DeRolph III*"). There is no mechanism in Ohio by which the State could have requested further reconsideration. The State has had as many bites of the apple as state law allows, and *DeRolph IV* was truly a *final* final judgment.

involved," so long as there is "something in the case before the state court which at least would call its attention to the Federal question as one that was relied on by the party[.]" *Dewey v. Des Moines*, 173 U.S. 193, 199 (1899). Petitioners' Answer in *Lewis* did just that, and the claims Petitioners now assert are sufficiently encompassed by "substantive due process" as to be cognizable here. The Due Process Clause does not distinguish procedural and substantive components, and the concepts are not always distinct. The process that is due in the context of this case is access to Ohio's courts for enforcement of the final judgment awarded in *DeRolph IV*. Without that process, Petitioners' declared rights are left to the whim of the violator, the State of Ohio, and the Ohio Constitution is stripped of legal significance. The *process* deprivation (access to the courts) is thus an element of the *substantive* right to enforce the remedy *DeRolph IV* awarded (as opposed to being a precondition to the deprivation of a right). Likewise, because due process mandates fairness in the application of the law, equal protection is an element of due process, in addition to being independently protected in the Constitution. *See* Petition at 24, n.20; *Stanley v. Illinois*, 405 U.S. 645 (1972) (interweaving due process and equal protection analysis where only the latter was raised below).

B. *Lewis* – <u>not</u> *DeRolph IV* – is at issue.

The State's argument that Petitioners should have sought review of *DeRolph IV* rather than of *Lewis* is difficult to fathom. To the extent it is simply an application of the State's "closure" theory, it is equally absurd. Prevailing litigants do not appeal to this Court out of fear that final judgments awarded them by the high courts of the states are otherwise unenforceable.

To the extent the State means to suggest that Petitioners seek something more here than they were awarded in *DeRolph IV*, the argument is simply wrong. *DeRolph IV* declared with finality the unconstitutionality of Ohio's school funding system, and it reiterated the specific reforms the State must undertake. *DeRolph IV* was a comprehensive victory for Petitioners, and it contained no stay. But for *Lewis*, Petitioners would now be invoking the authority of Ohio's courts to enforce precisely what *DeRolph IV* awarded.

C. Petitioners' interests are momentous and merit due process protection.

The State attempts to deny federal due process protections by trivializing the interests Petitioners assert. But, as the Petition demonstrates, Petitioners' interest (in enforcing, through the courts of Ohio, remedies previously awarded for violations of educational rights already declared) is of such paramount importance as to require due process protection.[7] Moreover, this Court has already determined that state-created rights to education qualify for such protection. *Goss v. Lopez*, 419 U.S. 565 (1975).

Lewis' violations of Petitioners' due process rights cannot be justified by the contrivance of characterizing *Lewis* as mere superintendence of Ohio's lower courts. In the usual

[7] *See DeRolph IV* at 436-37 ("[T]he constitutional mandate must be met....The Free Speech Clause of the United States Constitution, the Equal Protection Clause of the United States Constitution, the Thorough and Efficient Clause of the Ohio Constitution, and all other provisions of the Ohio and United States Constitutions protect and guard us at all times."); *DeRolph v. State*, 89 Ohio St.3d 1, 11, 728 N.E. 2d 993 (2000) ("*DeRolph II*") ("the stakes in this endeavor cannot be overestimated--we are dealing with the futures of the children of this state and in reality the very future of our state"). *Accord, Grutter v Bollinger*, 539 U.S. ____, 123 S.Ct. 2325, 2340 (2003); *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954).

circumstances, a writ of prohibition may be of "purely state concern," as the State argues. But when that writ violates the Due Process Clause, state interests are transcended, and neither the State nor the Ohio Supreme Court may arrogate to itself the final word on the subject.[8]

Finally, the State's claim that it is free to deprive Petitioners of the interests secured in *DeRolph* because Petitioners can always bring a new suit is nonsensical. If rights vested through litigation can be denied arbitrarily by the State, what purpose could be served in starting over again? Litigation is not a game. The rule of law demands that the outcome of litigation be honored and implemented by the parties, with the aid of the courts if necessary. The State's insistence that Petitioners have received all the process due them because they were permitted to litigate, and repeatedly prevailed, in Ohio's courts for a decade – notwithstanding *Lewis*' deprivation of the *results* of that litigation – makes a mockery of due process. State's Brief at 2. The constitution does not protect process as an end in itself. Process stripped of consequence is meaningless and constitutionally insufficient.

The State condemns the prospect of "merry-go-round" litigation, but it is the State's own refusal to conform to the law that is the cause. The course the State proposes – that Petitioners begin anew to seek what in law they have already achieved – condemns Petitioners to a Sisyphusian fate in

[8] *See McKnett v. St. Louis & S. F. R. Co.*, 292 U.S. 230, 233 (1934) ("The power of a State to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the Federal Constitution."). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982).

which they endlessly seek and win what the State forever denies them. The movie GROUNDHOG DAY comes to mind.[9]

D. Protection of Petitioners' rights need not entangle the Court in local matters.

The State warns that all manner of adverse consequences will flow if the Court grants this Petition: the Court will be drawn into reconsideration of *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); state law issues will all be federalized; the Court will find itself superintending Ohio's schools. None of these fears is justified.

The due process rights asserted by Petitioners – to state-created judicial processes for enforcement of previously-issued remedial decrees – do not depend upon reconsideration of *Rodriguez*. Similarly, because the interests Petitioners assert are of paramount importance and the deprivations are egregious (working a *complete* divestment of rights declared in *DeRolph IV*), granting the Petition would have far narrower implications than the State predicts. This Court has never hesitated to distinguish between deprivations of state-created rights that rise to the level of a federal claim and those that do not, and acceptance of this case would not require a departure from established guideposts. In response to the contention that "even reviewing this case would draw the Court far deeper into state sovereign territory than it has ever trod," (State's Brief at 4), Petitioners paraphrase *Logan*: "Certainly, it would require a remarkable reading of a 'broad and majestic [term],' to conclude that a horse trainer's license is a protected property interest under the Fourteenth Amendment," while state-created rights to education, and to judicial enforcement of declared rights, are not. *See Logan* at 431 (citation omitted).

[9] Columbia/Tristar Studios 1993.

The State's claim that this Court will be drawn into superintending Ohio's schools if it grants the Petition is particularly troubling. *See* State's Brief at 29. Petitioners do not ask this or any other Court to superintend Ohio's schools or to dictate the precise parameters of the remedy the State must implement.[10] Assuming the State complies, as it must, with a decision rendered by this Court, there is no reason why federal oversight of Ohio's schools should follow. The State's argument to the contrary appears to carry an implicit threat that the State intends to continue violating the rights of its school children *even in defiance of this Court*. Such intimation only further evinces a disregard for the rule of law, and it cannot be permitted to deter this Court's review. Officials who delayed, obstructed, and dissembled in the wake of the school desegregation cases of the last century ultimately were compelled to conform to constitutional requirements. This Court was not cowed by the recalcitrance of state officials then, and it must not be bullied by the arrogance of Ohio's now.

CONCLUSION

For the foregoing reasons and those set forth in the Petition, Petitioners respectfully request that the Petition be granted.

---

[10] Petitioners have always understood that the contours of the ultimate remedy for the unconstitutionalities declared in *DeRolph* must be determined by the State (in conformance with the specific dictates of *DeRolph*). Petitioners have, at various points in the litigation, requested certain items of *interim* relief. For the most part, the Ohio Supreme Court did not order such relief, and when it did (*see DeRolph II* at 351 (ordering "immediate" funding of unfunded mandates)), the State did not comply. But the court's determination not to order certain elements of relief on an interim basis does not in any way diminish the *present* obligation of the State to comply with the final judgment in *DeRolph IV*.

Respectfully submitted,

NICHOLAS ANDREW
PITTNER
Counsel of Record
SUSAN B. GREENBERGER
SUE W. YOUNT
JOHN F. BIRATH, JR.
MICHAEL D. LAYISH
BRICKER & ECKLER LLP
100 SOUTH THIRD STREET
COLUMBUS, OHIO 43215-4291
(614) 227-2300
(614) 227-2390 (FAX)

Counsel for Petitioners

Date: September 24, 2003